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NSW Submarine Cable Systems Sdn Bhd v Unisoft Sdn Bhd

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–894 OF 2003
NORAINI ABDUL RAHMAN JC
17 SEPTEMBER 2009

C

Contract — Agreement — Agreement to supply computers — Whether there was contract between parties — Whether plaintiff had instituted action against wrong party

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Evidence — Oral agreement — Whether can be admitted to interpret written agreement — Evidence Act 1950 ss 91 & 92

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In April 1997, the plaintiff and the defendant entered into an agreement referred to as the memorandum of understanding ('the agreement'). Under the agreement the plaintiff was to supply computers to the defendant, which was described as the operator of the Pusat Latihan Komputer Belia ('PLKB'), by placing them at 200 PLKB centres located at various parts of Malaysia, at agreed prices. The plaintiff had delivered the computers as directed and the defendant had made part payment of the sum to be paid with a balance sum of RM3,280,800 remaining unpaid. The plaintiff commenced the present action to claim this outstanding amount. On 17 April 1997, the Ministry of Youth and Sports had signed a memorandum of understanding ('the MOU') with Unisoft Access Sdn Bhd ('UASB'), appointing the latter to be the operator of the PKLB. It was the defendant's case that the plaintiff had instituted an action against the wrong party in that since UASB was appointed the operator of the PKLB under the MOU, the plaintiff ought to commence its action against UASB and not the defendant. At the trial the plaintiff through its witnesses produced delivery notes as evidence that the computers were delivered to the various addresses as was contained in those delivery notes. The defendant denied any dealings with the plaintiff after the execution of the agreement. The sole issue before the court was whether there existed a contract between the plaintiff and the defendant.

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Held, allowing the plaintiff's claim with costs:

(1) Under s 91 of the Evidence Act 1950 ('the Act') if the agreement between the parties had been reduced into writing, as in this case, it was the writing that had to be looked at in determining the terms of that agreement. Further, in such a case s 92 of the Act does not enable any

party to the agreement or its witnesses to give their views on how the contract ought to be interpreted. Their views are entirely irrelevant (see paras 9–13).

(2) Based on the authorities and the agreement entered into between the parties in this case it was evident that there was a binding contract between the plaintiff and the defendant. At the material time the defendant was the operator of the PKLB and the plaintiff's duties and responsibilities were as described in the agreement they had executed. The plaintiff had through its witnesses proven that it had performed its part of the agreement and that there was non-payment of RM3,280,800 by the defendant. As such the plaintiff had proven its case against the defendant on a balance of probabilities (see paras 14–15).

[Bahasa Malaysia summary

Pada April 1997, plaintif dan defendan menandatangani satu perjanjian yang dirujuk sebagai memorandum persefahaman ('perjanjian tersebut'). Di bawah perjanjian tersebut plaintif akan membekalkan komputer-komputer kepada defendan, yang dikenali sebagai pengendali Pusat Latihan Komputer Belia ('PLKB'), dengan meletakkannya di 200 pusat-pusat PLKB di pelbagai lokasi di Malaysia, pada harga yang dipersetujui. Plaintif telah menghantar-serah komputer-komputer itu seperti diarahkan dan defendan telah membuat pembayaran sebahagian jumlah harus dibayar dengan jumlah baki RM3,280,800 tinggal untuk dibayar. Plaintif memulakan tindakan ini bagi menuntut jumlah yang tertunggak itu. Pada 17 April 1997, Kementerian Belia dan Sukan telah menandatangani satu memorandum persefahaman ('MP') dengan Unisoft Access Sdn Bhd ('UASB'), melantik UASB menjadi pengendali PKLB. Adalah menjadi kes defendan yang plaintif telah memulakan tindakan terhadap pihak yang salah memandangkan UASB dilantik sebagai pengendali PKLB di bawah MP, plaintif sepatutnya memulakan tindakannya terhadap UASB dan bukannya defendan. Semasa perbicaraan plaintif melalui saksi-saksinya mengemukakan nota-nota serahan sebagai bukti bahawa komputer-komputer itu dihantar-serah ke pelbagai alamat seperti yang terkandung dalam nota-nota serahan itu. Defendan menafikan berurusan dengan plaintif selepas pelaksanaan perjanjian tersebut. Isu tunggal di hadapan mahkamah adalah sama ada wujud suatu kontrak antara plaintif dan defendan.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Di bawah s 91 Akta Keterangan 1950 ('Akta tersebut') jika perjanjian antara pihak-pihak telah direkodkan secara bertulis, seperti dalam kes ini, perjanjian bertulis yang perlu dilihat dalam menentukan syarat-syarat perjanjian tersebut. Selanjutnya, dalam kes sedemikian s 92 Akta tersebut tidak membenarkan mana-mana pihak perjanjian

tersebut atau saksi-saksinya untuk memberikan pendapat-pendapat mereka bagaimana kontrak itu sepatutnya ditafsirkan. Pendapat-pendapat mereka sama sekali tidak relevan (lihat perenggan 9–13).

(2) Berdasarkan autoriti-autoriti dan perjanjian yang ditandatangani antara pihak-pihak dalam kes ini ianya terbukti bahawa terdapat satu kontrak yang mengikat antara plaintif dan defendan. Pada masa-masa material defendan adalah pengendali PKLB dan tugas-tugas dan tanggungjawab-tanggungjawab plaintif telah dinyatakan dalam perjanjian yang ditandatangani oleh mereka. Plaintif telah melalui saksi-saksinya membuktikan yang ia telah melaksanakan bahagiannya dalam perjanjian tersebut dan bahawa defendan tidak membayar RM3,280,800. Oleh itu plaintif telah membuktikan kesnya terhadap defendan atas imbangan kebarangkalian (lihat perenggan 14–15).]

Notes

For a case on oral agreement in general, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1981.

For cases on agreement in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2466–2492.

Cases referred to

AE Reynolds v PP [1956] MLJ 101, HC (folld)

Mohamed Mustafa v Kandasami [1979] 2 MLJ 109, FC (folld)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38, CA (folld)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (folld)

Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129, FC (folld)

Legislation referred to

Evidence Act 1950 ss 91, 92

Richard Wee (HW Yip with him) (Wong Gowry & Yip) for the plaintiff.
Munir bin Abdullah (Munir & Co) for the defendant.

Noraini Abdul Rahman JC:

FACTS

[1] The plaintiff, NSW Submarine Cable Systems Sdn Bhd (formerly known as Siemens Nixdorf Information Systems Sdn Bhd) and the defendant, Unisoft Sdn Bhd, entered into an agreement referred to as

memorandum of understanding ('MOU') sometime in April 1997. The MOU was stamped either on 22 or 23 April 1997. In the MOU, the defendant was described as the operator of Pusat Latihan Komputer Belia ('PLKB') a project under the Ministry of Youth and Sports. The plaintiff was to supply computers to the defendant but those computers were to be placed at 200 PLKB centres throughout Malaysia at agreed prices. It is an agreed fact that the plaintiff had delivered the computers to third parties under the said PLKB project. In fact it is a term of the MOU that plaintiff should supply to 200 third parties at 200 centres. However only 176 PLKB centres got the delivery of the computers. Part payment was paid to the plaintiff but a balance of RM3,280,800 remains to be paid. On 15 March 2003, the plaintiff took action to sue the defendant for the sum.

[2] Also at around the same time, ie 17 April 1997, another memorandum of understanding ('second MOU') was signed between Kementerian Belia dan Sukan Malaysia (Ministry of Youth and Sports) and Unisoft Access Sdn Bhd. In the second MOU, Unisoft Access Sdn Bhd was appointed to be the operator of the PLKB program.

[3] The defendant alleged that they were not responsible to pay the balance of RM3,280,800 because it was Unisoft Access Sdn Bhd that entered into the second MOU with Kementerian Belia dan Sukan. Therefore the plaintiff should sue Unisoft Access and not them, Unisoft Sdn Bhd.

[4] PW3 who previously held the position of vice president of Finance and Business Administration at the plaintiff's company testified that she knew of the MOU as well as the defendant being their client because she was told about it by her predecessor one Mr Tilman Schroeder. She also knew that the defendant owed the plaintiff the balance of the debt owed although she did not know the actual amount.

[5] The other two witnesses, PW1 and PW2 in fact testified as to the delivery of the computers to the various centres under the PKLB project. According to the delivery notes in exh P1, the computers were delivered to the various addresses as was contained in those delivery notes. Later the plaintiff invoiced the defendant. There were part payment made by the defendant.

[6] DW1 and DW2 both disputed the fact that the defendant was owing the plaintiff the outstanding amount. According to DW1, the MOU between the plaintiff and the defendant was merely to facilitate the plaintiff so that the plaintiff could show their head office in Germany that it had secured sales in Malaysia. This MOU was to allow the plaintiff to 'lock in' the sales for that financial reporting period.

A According to her, after the execution of the MOU between the plaintiff and the defendant, the defendant had no dealings with the plaintiff. The court find it very strange and hard to believe this testimony of DW1. It is very clear through exh P1 that computers were delivered after the execution of the MOU. It appeared to the court that her testimony cannot be relied upon.

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[7] The defendant's case is that the billing of the invoice should have been made to Unisoft Access Sdn Bhd and not to it, Unisoft Sdn Bhd. DW1 testified that both Unisoft Access and Unisoft Sdn Bhd shared the same address. However it was Unisoft Access that signed the second MOU with the C Ministry of Youth and Sports and therefore it was Unisoft Access that was the operator. Hence, the plaintiff should have invoiced Unisoft Access and eventually because of non-payment of balance debt owing, the plaintiff should have sued Unisoft Access. In short the plaintiff had sued the wrong party.

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[8] The issue that this court had to determine is whether there exist a contract between the plaintiff and the defendant.

E **[9]** Sections 91 and 92 of the Evidence Act 1950 provide as follows:

> 91 Evidence of terms of contracts, grants and other dispositions of property reduced to form of document
> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the F form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is G admissible under the provisions hereinbefore contained.
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> 92 Exclusion of evidence of oral agreement
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s 91, no evidence of any oral H agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

I **[10]** In *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109 Chang Min Tat FJ (JCA as he then was) said:

> The examination of the document which must be conducted must clearly be within the provisions of the Evidence Act. If it is correct that on the pleadings and having regard to the testimony of the respondent himself, the document is the

reduction of the transaction between him and the appellant by consent and agreement, then under s 91 of the Evidence Act it must be regarded as the appropriate and only evidence of the terms of their agreement and no other evidence can be substituted for it. And, under s 92, it is conclusively presumed between the parties that they intended the document to contain a full and final statement of their intention and the parties may not therefore give extrinsic evidence to contradict, vary, add to or subtract from its terms. On this examination at law, the relationship between the parties will be ascertained.

[11] In *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 Chang Min Tat FJ (JCA as he then was) said:

In dealing with the issue before us, we bear in mind the following:

Where a contract has been reduced to writing,

'it is in the writing that we must look for the whole of the terms made between the parties', per Viscount Haldane LC in *Dunlop v Selfridges* [1915] AC 847 at p 854. And in such a circumstance, s 92 of the Evidence Act 1950 does not enable any party to that agreement to lead evidence contradicting varying adding to or subtracting from its terms.

[12] In *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, Abdul Kadir Sulaiman JCA (as he then was) said:

The construction of a contract is a question of law to be determined by this court. This court is not bound by the admission of witnesses or the concession made by counsel in the court below.

[13] In *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, Gopal Sri Ram FJ (JCA as he then was) said:

It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.

When it comes to the meaning of words, it does not matter whether they appear in a contract or written law, the result is the same. The point is illustrated by the judgment of Thompson J (as he then was) in *AE Reynolds v Public Prosecutor* [1956] MLJ 101, at p 103:

It may be that the learned President accepted the evidence of the various functionaries of the Police Department who gave evidence as to what they considered to be the meaning of the relevant Orders as conclusive. If so, I think he

A was wrong. Whatever maybe the attitude of government functionaries who have to deal with these Financial General Orders there is nothing sacrosanct about them. They were not brought down from Pisgah by any bureaucratic Moses. They are written words and like any other written words what they mean is a matter of construction. It is no concern of mine as a judge what civil servants do among themselves. As far as a judge is concerned, they can say that black is white and for the purposes of their own activities black is white. But when the criminal law and its sanctions are invoked and any question of construction is involved then that is a question for the court to decide and not any financial assistant or even any Superintendent of Police who happens to be in charge of records.

C So too here. It matters not a jot to us what the plaintiff thought his entitlements under the contract with the defendant were. Neither does it matter to us what the defendant's witnesses thought or the way in which that contract ought to be interpreted. Their views are entirely irrelevant; as irrelevant as the views of the witnesses who gave their interpretation of the D financial orders in *Reynolds*.

[14] Following the authorities cited above, this court having looked at the MOU (exh P5) is of the view that it is a binding contract between the plaintiff and the defendant. The defendant was the operator of PLKB and the E plaintiff's duties and responsibilities was as specified in section 2 of the MOU. The plaintiff had proven through the testimony of PW1, PW2 and PW3 and exh P1 that it had performed its part of the MOU and that there is non-payment by the defendant to the amount of RM3,280,800.

F **[15]** Based on the above reasons the court finds on a balance of probability the plaintiff had proved its case against the defendant. The court allows the plaintiff's claim with costs.

Plaintiff's claim allowed with costs.

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Reported by Kohila Nesan

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